

ESTTA Tracking number: **ESTTA672381**

Filing date: **05/14/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207895
Party	Defendant Virginia Polytechnic Institute and State University
Correspondence Address	NORM J RICH, ROBERT S WEISBEIN FOLEY & LARDNER LLP 90 Park Avenue New York, NY 10016 UNITED STATES IPdocketing@foley.com, rweisbein@foley.com, wwalker@foley.com, nrich@foley.com, tdinkens@foley.com
Submission	Other Motions/Papers
Filer's Name	Robert S. Weisbein
Filer's e-mail	IPdocketing@foley.com, rweisbein@foley.com, wwalker@foley.com, nrich@foley.com, tdinkens@foley.com, sschoepfer@foley.com
Signature	/Robert S. Weisbein/
Date	05/14/2015
Attachments	REPLY MEMORANDUM ON MOTION (ON STANDING) 05-14-2015.pdf(830428 bytes) SECOND DECLARATION OF ROBERT S WEISBEIN.pdf(588443 bytes)

-----X	
HOKIE OBJECTIVE ONOMASTICS	:
SOCIETY LLC,	:
	:
Opposer,	:
	:
v.	:
	:
VIRGINIA POLYTECHNIC INSTITUTE	:
AND STATE UNIVERSITY,	:
	:
Applicant.	:
-----X	

Opposition No. 91207895

Serial No.: 85-531,923

I. INTRODUCTION

In granting Applicant Virginia Polytechnic Institute and State University (“Virginia Tech”) initial motion to dismiss the opposition on the ground that Opposer Hokie Objective Onomastics Society LLC (“Hokie Society”) lacked the requisite standing, the Trademark Trial and Appeal Board (the “Board”) held:

In this case, opposer's statement of its mission and educational programming set forth in paragraphs 2 and 3¹ are not related to the services set forth in applicant's application, and hence do not support the allegation in paragraph 4 that opposer is a competitor of applicant. Applicant's identified services do not include educational services regarding the etymology of the word HOKIE, and opposer does not allege that it renders the services identified in the application. Opposer does not set forth allegations from which

¹ Notice of Opposition Paragraphs 2 and 3: “2. Opposer’s mission includes carrying on educational activities and promotion of knowledge of the etymology of the word HOKIE to help preserve for every student, alumnus, fan and community supporter of VPI&SU the unfettered right to use the word HOKIE to denote such support and to refer to connections and relationships to VPI&SU.

3. Opposer offers educational programming in the form of lectures, symposia and presentations to classes, organizations, businesses and individuals interest in learning more about the public's right to use the word HOKIE."

it is plausible that registration of HOKIE would prevent opposer from using that term in providing education regarding the etymology of the term.

While the allegations in the Amended Notice of Opposition purposefully sought to avoid a challenge to Hokie Society's standing by deleting reference to its mission statement and by broadening its identification of services to "educational lectures, symposia and presentations to classes, organization, businesses and individuals on subjects such as history, sociology, etymology, linguistics and law. . . ." (Paragraph 2 of Amended Notice of Opposition), without tying those services to the etymology of the word "Hokie," the evidence adduced during discovery clearly shows that the "educational services" rendered by Hokie Society are distinctly different from the educational services of Virginia Tech such that the two parties are not competitors.

What Hokie Society's discovery responses and the deposition testimony of its sole member, director, officer and employee, James Creekmore, unequivocally establish is that the facts as alleged in paragraphs 2 and 3 of the initial Notice of Opposition regarding its mission and the nature of its educational services, which were the underpinnings supporting the Board's finding that Hokie Society lacked standing, have not changed. Hokie Society's mission then as it is now is "[t]o preserve for every student, alumnus, fan and community supporter of Virginia Polytechnic Institute & State University the unfettered right to use the word HOKIE to denote such support, including through education and promotion of the etymology of the word HOKIE. . . ." *See* Hokie Society Facebook Page Mission Statement annexed as Exhibit 10 to Weisbein Dec.; Creekmore Dep. at 64: 5-25; 65: 1, 8-19. What is also clear is that the educational services rendered by Hokie Society relate solely to the etymology of the word "Hokie" and the public's purported right to use word "Hokie," which services are not included in Virginia Tech's

application.² Consequently, the Board, just as it had granted Virginia Tech’s initial motion to dismiss, should now grant summary judgment in Virginia Tech’s favor because Hokie Society lacks standing.

II. ARGUMENT

A. Hokie Society Lacks a Real Interest in the Opposition Because Its Educational Services Are Not Competitive with Those Identified in the Application.

Tellingly, Hokie Society describes its educational services as “**touch[ing]** upon subjects such as history, sociology, etymology, linguistics and law, **in examining whether VPT&SU has any right to prevent others from using the term HOKIE**” (emphasis added). Hokie Society Brief at p. 3. Hokie Society offers no university level courses in any of these subject areas, but rather gives infrequent talks to local community groups on the etymology of the term “Hokie” and the extent to which Virginia Tech can stop others from using the term.

Virginia Tech’s educational services, namely, providing courses of instruction **at the university level**, educational research, organizing exhibits for educational purposes in the nature of scientific shows and school fairs, conducting educational conferences in the fields of math, politics, sociology, physics, chemistry, and science, have nothing whatsoever to do with the history, meaning or right to use the term “Hokie.” *See* Hincker Dec. at ¶ 13.

While it is true that unlimited descriptions of goods or services are presumed to travel in all channels of trade and to all relevant classes of consumers, this concept does not assist Hokie Society here. *See* TMEP § 1207.01(a)(iii). In an effort to enhance the similarity of the parties’ educational services in order for Hokie Society to bolster its argument of competitive proximity for standing purposes, Hokie Society argues that through “extrinsic argument” Virginia Tech has

² Virginia Tech’s trademark application to register HOKIE as a trademark for entertainment and educational services, Application Serial No. 85/531,923, which is the subject of this Opposition is herein after referred to as the “Application.”

sought to narrow the scope of the identification of services in its Application. This is simply false. Virginia Tech offers courses of instruction at the university level. In order to determine what the normal channels of trade are and who the usual classes of purchasers are for providing courses of instruction at the university level it is necessary to gain an understanding of the meaning of that term. The online Oxford dictionary defines a university as “an educational institution designed for instruction, examination, or both, of students in many branches of advanced learning, conferring degrees in various faculties, and often embodying colleges and similar institutions.” Similarly, Dictionary.com defines “university” as “an institution of learning of the highest level, having a college of liberal arts and a program of graduate studies together with several professional schools, as of theology, law, medicine and engineering, and authorized to confer both undergraduate and graduate degrees.” *See* definitions from Oxford Dictionaries and Dictionary.com, annexed hereto as Exhibit A to the Second Declaration of Robert Weisbein dated May 14, 2015, submitted herewith (hereinafter referred to as “Weisbein May 14th Dec.”). Hokie Society is not such an educational institution and consequently cannot offer “courses of instruction at the university level.”

Furthermore, as detailed in the Declaration of Lawrence G. Hincker, Associate Vice President of University Relations, submitted with Virginia Tech’s opening brief, the University provides courses of instruction for academic credit in a diverse range of subjects as identified in the Application, but not on the subject of etymology of the word “Hokie,” and awards undergraduate and graduate degrees in a wide variety of fields of study, including the arts, humanities and sciences. Its degree programs are approved by the State of Virginia and the university is fully accredited. To be sure, the educational services offered by Virginia Tech as identified in its Application are fundamentally different from the “educational services” offered

by Hokie Society. Not only are the services rendered by the parties dissimilar and, therefore, not competitive, but they travel through different channels of trade and are targeted to vastly different consumer audiences.

Unlike Virginia Tech's university level courses, Hokie Society's lectures are neither approved by the State Counsel for Higher Education nor is Hokie Society accredited by the Southern Association of Colleges and Schools. Consequently, attendees at Hokie Society's lectures receive no credits toward a diploma. Creekmore Dep. at 204:24-25; 205:1-11. Hokie Society's "Why Hokie Is Not A Trademark" lectures are infrequently given,³ unlike the regularly scheduled classes provided by Virginia Tech.

In a feeble attempt to argue that the educational services of Hokie Society and Virginia Tech are related, Hokie Society is reduced to arguing that it "provides services that are certainly part of the same broad category as the services provided by VPT&SU, in that they all involve education and instruction." Hokie Society Brief at p. 7. Without any evidentiary support, Hokie Society next argues that it is conceivable that it could expand its educational services to include the types of educational services offered by Virginia Tech. *Id.*; Creekmore Dec. at ¶ 17. However, not only is this argument pure conjecture, but it is directly at odds with the deposition testimony of Mr. Creekmore. Quoting the services identified in Virginia Tech's Application out of context and in a misleading manner, Hokie Society argues that it could provide its "Why

³ In the nearly three years since its inception on August 3, 2012, Hokie Society has given only five "Why Hokie Is Not A Trademark" lectures. See Opposer's Second Amended and Supplemental Responses to Applicant Virginia Polytechnic Institute And State University's Discovery Requests dated May 4, 2015, annexed as Exhibit B to the Weisbein May 14th Dec. See also Creekmore Dep. at 194:15-18.

Q. So it's true, is it not, that HOOS doesn't provide regularly scheduled classes in connection with any educational topics, correct?

A. Correct

Nor does Hokie Society organize and conduct symposia on any educational topics notwithstanding Mr. Creekmore's statement to the contrary in paragraph 15 of his Declaration.

Q. And has HOOS presented symposia on any particular topic or theme?

A. I don't think that anything that we have done would be considered, to date, to be symposia.

Creekmore Dep. at 194:24-25; 195:1-2.

Hokie Is Not A Trademark” lectures and presentations at an “exhibition for educational purposes . . . in the nature of [a] school fair” or at an “educational conference [] in the field of . . . politics [or] sociology.”⁴ However, the undisputed facts establish that the educational services regarding the etymology and right to use the term “Hokie” provided by Hokie Society are not in any way related to the services identified in the Application and are certainly not in the zone of expansion. Indeed, at his deposition Mr. Creekmore admitted Hokie Society did not perform any of the above services:

Q: Do you provide exhibitions in the nature of scientific shows or school fairs?

A: No.

Q: Do you conduct conferences in the field of math?

A: No.

Q: Do you conduct conferences in the field of politics?

A: No.

Q: Do you conduct conferences in the field of sociology?

A: No.

Q: Do you conduct conferences in the field of physics?

A: No.

Q: Do you conduct conferences in the field of chemistry?

A: No.

Q: Do you conduct conferences in science?

A: No.

⁴ The services identified in the Application in relevant part are:

International Class 41 Services:

Organizing exhibitions for educational purposes in the nature of scientific shows and school fairs, conducting, educational conferences in the field of math, politics, sociology, physics, chemistry and science. . . .

Creekmore Dep. at 165:13-25; 166:1-7.

Virginia Tech's description of services simply cannot be construed to encompass Hokie Society's services. First, Hokie Society has either expressly admitted, or failed to establish, that it actually provides any of the services identified in Virginia Tech's Application (such as providing exhibitions and conferences, or performing educational research). Beyond baldly asserting that it researches the etymology and history of the word "Hokie," there is absolutely nothing in the record to support its claim of providing educational research services. Creekmore Dep. At 164: 16-24. In fact, the word "research" is not even mentioned in Opposer's "About Us" section on its Facebook Page, or within its Mission Statement. *See* Hokie Society Facebook Page annexed as Exhibit 10 to Weisbein Dec.

Second, quite unlike an institution of higher learning, Hokie Society was created and exists solely for the purpose of opposing Virginia Tech's registration of HOKIE and espousing the view that the word "Hokie" is not a trademark. *See* Hokie Society Facebook Page annexed as Exhibit 10 to Weisbein Dec. It "markets" its purported educational services to civic groups such as the Torch Society, the Blacksburg Breakfast Lion's Club, and the Virginia Tech Creative Learning Academy for Senior Scholars (the "Academy for Senior Scholars"), not undergraduate or graduate university students. Creekmore Dep. At 195: 3-6; 22-25.

Nonetheless, in yet another attempt to recast its services in a broader light, Hokie Society claims to offer university-level educational services because of a one-time, invitation to speak to the Academy for Senior Scholars⁵. This one-off lecture in no way transforms Hokie Society into an institution of higher learning, conferring upon it competitor status. In fact, it does the

⁵ This event is said to have occurred on a **Saturday, April 18, 2015**, even though classes for the Academy for Senior Scholars are held on **Tuesdays** and the spring semester concluded on **April 14, 2015**. *See* Academy for Senior Scholars' website, annexed as Exhibit D to the Creekmore Dec. *See* Opposer's Brief at p. 8; *see also* Creekmore Decl. at ¶ 17.

opposite. It shows that Hokie Society markets its “educational services” to “Baby Boomers,” or “people 50 and older,” who seek knowledge provided by “local people.” *See* the Academy for Seniors’ Website annexed as Attachment D to the Creekmore Dec. This is in stark contrast to the university level courses provided by Virginia Tech to university students seeking a diploma. Given their distinctly different services, channels of trade, and classes of consumers, the parties do not compete for educational services.

B. Hokie Society Is A Classic Intermeddler And Will Not Be Damaged By The Registration of HOKIE.

The Board requires an opposer to plead and prove standing in order to prevent “self-appointed guardians of the purity of the Register” from challenging legitimate trademark rights. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1077 (C.C.P.A. 1982). Hokie Society is exactly the sort of opposer that the standing rules are designed to preclude. Mr. Creekmore established Hokie Society because he believed that Virginia Tech’s trademark enforcement policy was arbitrary, selective and overreaching. Creekmore Dep. at 26:18-24. He therefore wanted “to better educate the community on what their potential rights were to use the word Hokie. . . .” Creekmore Dep. 33:17-21. While he believed that he could oppose the mark in his own, individual capacity, he decided to form Hokie Society a few weeks after the mark was published because he liked the LLC/not-for-profit structure. Creekmore Dep. at 54:15-25; 55:1-5. This is a classic case of a meddlesome party instituting an opposition, not to advance a legitimate business interest, but to grind an ideological axe. Hokie Society is nothing more than a front for Mr. Creekmore’s campaign to thwart Virginia Tech’s trademark enforcement strategy. It is hard to imagine a more perfect example of an “intermeddler.”

To fabricate its claim of damage by reason of the registration of HOKIE, Hokie Society has disguised itself as a trademark owner, claiming to render educational services under the

marks HOKIE FAN and HOKIE OBJECTIVE ONOMASTICS SOCIETY.⁶ This disguise is transparent, and we are hopeful the Board can easily see through it. Ironically, Hokie Society's alleged trademark use is directly at odds with the fundamental precepts of the organization, namely, that "Hokie" is not a trademark because it is generic or merely descriptive as alleged in Count B of the Amended Notice of Opposition. In any event, a finding by the Board that Hokie Society has standing would lower even further the minimal standing threshold and would open the floodgates to other similar dissidents who would form organizations whose only "service" is to challenge the trademarks of legitimate brand owners.

III. CONCLUSION

For the reasons stated above, Virginia Tech respectfully requests that its motion for summary judgment should be granted and the Opposition be dismissed.

Dated on this 14th day of May, 2015.

Respectfully submitted,

FOLEY & LARDNER LLP

By: 

Robert S. Weisbein, Esq.

Norm J. Rich, Esq.

FOLEY & LARDNER LLP

90 Park Avenue

New York, New York 10016

Telephone: (212) 682-7474

Facsimile: (212) 687-2329

Attorneys for Applicant

*Virginia Polytechnic Institute and State
University*

⁶ Even if the Board were to find that Hokie Society is rendering educational services under the marks HOKIE FAN and HOKIE OBJECTIVE ONOMASTICS SOCIETY, the services are so far afield from Virginia Tech's services identified in the Application such that Hokie Society is not a competitor of Virginia Tech and would not be damaged by the registration of HOKIE.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the following: (i) APPLICANT VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT OPPOSER HOKIE OBJECTIVE ONOMASTICS SOCIETY LLC LACKS STANDING and (ii) SECOND DECLARATION OF ROBERT S. WEISBEIN IN SUPPORT OF APPLICANT VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT OPPOSER HOKIE OBJECTIVE ONOMASTICS SOCIETY LLC LACKS STANDING, was served by first class mail on this 14th day of May, 2015, to Opposer's correspondent of record as follows:

Keith Finch, Esq.
The Creekmore Law Firm PC
318 North Main Street
Blacksburg, VA 24060



WILLIAM S. WALKER, JR.

-----X	
HOKIE OBJECTIVE ONOMASTICS	:
SOCIETY LLC,	:
	:
Opposer,	:
	:
v.	:
	:
VIRGINIA POLYTECHNIC INSTITUTE	:
AND STATE UNIVERSITY,	:
	:
Applicant.	:
-----X	

I, Robert S. Weisbein, under penalty of perjury under the laws of the United States of America, declare as set forth below:

1. I am an attorney licensed by the State of New York, and am a partner with the law firm of Foley & Lardner LLP, attorneys of record for Applicant Virginia Polytechnic Institute and State University (“Applicant”) in the above-captioned proceeding. I have personal knowledge about the matters described in this declaration as set forth below.

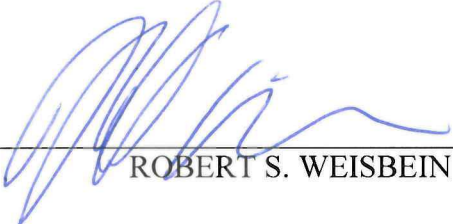
2. I make this declaration in support of Applicant's Motion For Summary Judgment.

3. Annexed hereto as Exhibit A are true and correct copies of the definition pages for the word “university” from the Oxford Dictionaries website, located at <http://www.oxforddictionaries.com/us/definition/american_english/university> and the Dictionary.com website, located at <<http://www.dictionary.reference.com/browse/university>>. I

located these references from an Internet search that I conducted seeking the definition of the word “university,” using the Google search engine.

4. Annexed hereto as Exhibit B is a true and correct copy of Opposer’s Second Amended and Supplemental Responses to Applicant Virginia Polytechnic Institute and State University’s Discovery Requests to Opposer Hokie Objective Onomastics Society LLC dated May 4, 2015 (without exhibits). In particular, I direct the Board’s attention to Hokie Society’s supplemental response to Virginia Tech Interrogatory No. 11.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct, and that this Declaration was executed on May 14, 2015 in New York, New York.



ROBERT S. WEISBEIN

EXHIBIT A

Thanks for the feedback! [Back](#)

We'll review this ad to improve your experience in the future.

Help us show you better ads by updating your [ads settings](#).




HOME > US ENGLISH > UNIVERSITY

university



See definition in [Oxford Advanced Learner's Dictionary](#)

Syllabification: u·ni·ver·si·ty

Pronunciation: /ˌyooənəˈvɜrsədē/ 

Definition of *university* in English:
noun (plural **universities**)

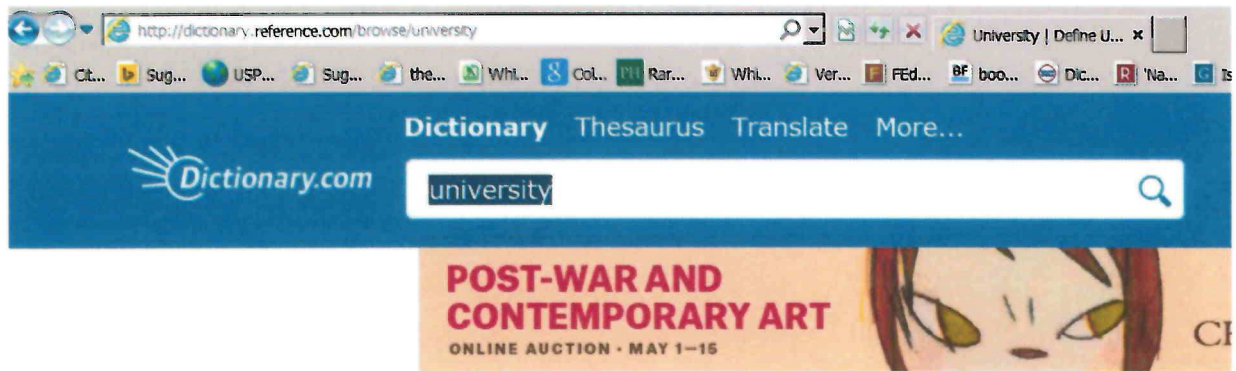
An **educational institution designed** for **instruction**, **examination**, or both, of **students** in many **branches** of **advanced learning**, **conferring** degrees in **various faculties**, and often **embodying colleges** and **similar institutions**:

[IN NAMES] *'Oxford University'*

'the University of California'

[AS MODIFIER] *'the university buildings'*

'a university professor'



university

[yoo-nuh-vur-si-tee]

[Spell](#) [Syllables](#)

[Examples](#) [Word Origin](#)

noun, plural **universities**.

1. an institution of learning of the highest level, having a college of liberal arts and a program of graduate studies together with several professional schools, as of theology, law, medicine, and engineering, and authorized to confer both undergraduate and graduate degrees. Continental European universities usually have only graduate or professional schools.

EXHIBIT B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

HOKIE OBJECTIVE ONOMASTICS)	
SOCIETY LLC,)	
)	
Opposer,)	
v.)	Opposition No. 91207895
)	
VIRGINIA POLYTECHNIC INSTITUTE)	Serial No. 85-531,923
AND STATE UNIVERSITY,)	
)	
Applicant.)	

**OPPOSER'S SECOND AMENDED AND SUPPLEMENTAL RESPONSES TO
APPLICANT VIRGINIA POLYTECHNIC INSTITUTE AND STATE
UNIVERSITY'S DISCOVERY REQUESTS TO OPPOSER
HOKIE OBJECTIVE ONOMASTICS SOCIETY LLC**

Opposer Hokie Objective Onomastics Society LLC, by counsel, and without waiving any objections asserted in previous responses, provides the following amended and supplemental responses to Applicant's discovery requests.

INTERROGATORIES

2. *Identify all persons who have contributed or donated to, invested in or loaned money to Opposer, if any, at any time since Opposer's inception and the amount of such contribution, donation, investment or loan.*

ANSWER:

Opposer amends its previous answer to:

James R. Creekmore: \$923 in contributions
Keith Finch (of 318 N. Main Street, Blacksburg, VA 24060, 540-443-9350): about \$382 in contributions

11. *For each Opposer Event carried out by Opposer since its founding, provide the following details:*

- (i) *The date of such event;*
- (ii) *The location of such event;*
- (iii) *The purpose and subject matter of such event;*
- (iv) *The duration of such event;*

THE CREEKMORE
LAW FIRM PC

00131846 DHR

- (v) *The identity of the persons who attended such event on the behalf of Opposer*
- (vi) *The approximate (or exact, if known) number of attendees at such event; and*
- (vii) *The identity of attendees at such event, if known, including any guest speakers.*

ANSWER:

Opposer supplements its previous answer with:

Fifth Event

- (i) April 18, 2014
- (ii) 2387 Warm Hearth Drive, Blacksburg, VA 24060
- (iii) Dispelling of myths about the use of the word "Hokie" and other words associated with VPI&SU; rights of Blacksburg residents and businesses to use the word "Hokie"; tactics used by VPI&SU to discourage free use of the word "Hokie"; origins and history of the word "Hokie"
- (iv) Approximately one and a half hours
- (v) none
- (vi) approximately twenty-five
- (vii) Keith Finch (guest speaker), Theresa McCoy, other unknown persons

8. *All photographs taken at Opposer Events which are currently in Opposer's possession or control.*

ANSWER:

Opposer supplements its previous answer with:

See the documents served together with these responses, and in particular the documents numbered HOOS-000590 through HOOS-000597.

27. *Documents, other than those produced in response to any of the foregoing Requests, upon which Opposer intends to rely in connection with the within Opposition proceeding.*

ANSWER:

Opposer supplements its previous answer with:

See the documents served together with Opposer's responses, and in particular the documents numbered HOOS-000598 through HOOS-000624.

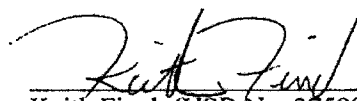
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 4th day of May, 2015.

Hokie Objective Onomastics Society LLC

By: 
James R. Creekmore, Manager

Respectfully submitted,



Keith Finch (VSB No. 37599)
THE CREEKMORE LAW FIRM PC
Attorney for Opposer
318 N. Main Street
Blacksburg, Virginia 24060
(540) 443-9350 – Telephone
(540) 443-9352 – Facsimile
keith@creekmorelaw.com

THE CREEKMORE
LAW FIRM PC

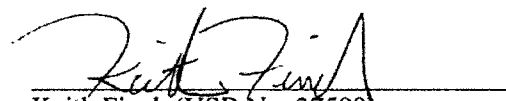
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 4th day of May, 2015.

Hokie Objective Onomastics Society LLC

By: 
James R. Creekmore, Manager

Respectfully submitted,


Keith Finch (VSB No. 37599)
THE CREEKMORE LAW FIRM PC
Attorney for Opposer
318 N. Main Street
Blacksburg, Virginia 24060
(540) 443-9350 – Telephone
(540) 443-9352 – Facsimile
keith@creekmorelaw.com

THE CREEKMORE
LAW FIRM PC